

VIRGINIA:

IN THE DEPARTMENT OF ENVIROMENTAL QUALITY

IN RE: Roger Darron Hutcherson

ORDER

This cause came to be heard on August 26, 2019, in the Department of Environmental Quality's Blue Ridge Regional Office, in Salem, Virginia.

Pursuant to § 10.1-1186 of the Code of Virginia, the Director of the Department of Environmental Quality ("DEQ") has the authority to issue special orders that may include injunctive relief and civil penalties.

I have reviewed the Record, Exhibits, and the Presiding Officer's Recommended Findings of Fact and Conclusions of Law in the above-referenced matter. Accordingly, I adopt those Recommended Findings of Fact and Conclusions of Law and incorporate them into this Order.

Pursuant to my authority under Va. Code § 10.1-1186, I order Roger Darron Hutcherson to comply with (1) the State Water Control Law, Va. Code § 62.1-44.2 et seq., and (2) the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210-10 et seq.

Specifically, I order Roger Darron Hutcherson to complete the following with respect to the property located at 4066 Webster Road in Glade Hill, Virginia (the "Site" and "Hutcherson Pond") and impacted state waters:

1. Repair or remove the dam on Hutcherson Pond as follows:
 - a. Within 14 days from the date of this Order, notify DEQ in writing if the dam will be repaired or removed.
 - b. Within 14 days from the date of this Order, install interim erosion and sediment controls, meeting the minimum standards set forth in 9 VAC 25-840-40, and submit photos of measures implemented to prevent additional impacts to state waters while other actions listed herein are implemented.
 - c. Within 30 days from the date of this Order, ensure that a vegetative cover is achieved on all areas of bare soil that is uniform, mature enough to survive, and will inhibit erosion until permanent corrective actions are completed. In the event DEQ observes the vegetative cover does not meet the listed cover criteria, reinstall measures within 7 days of receiving notice from DEQ that effective cover was not achieved.

- d. Within 30 days of the date of this Order, retain services of a licensed professional engineer to prepare a plan for repairing or removing the dam.
- e. Within 90 days of the date of this Order, submit a complete plan and schedule to DEQ and Franklin County for repairing or removing the dam stamped by a professional engineer. The plan shall include a construction sequence, any structural measures to be installed to repair the dam, and erosion and sediment controls to be implemented during construction. The plan shall provide for completion of dam removal or repair by April 1, 2020.
- f. Respond to any DEQ comments on the plan within 14 days from the date of receiving such comments.
- g. Within 60 days of plan approval, either dismantle or repair the dam in accordance with the approved plan and schedule in a manner that does not cause additional impacts to state waters. All repair and removal work shall be conducted by a contractor licensed by the Department of Professional and Occupational Regulation and experienced performing dam repairs.
- h. Notify DEQ in writing 7 days prior to initiating construction related to the dam.
- i. If the dam is repaired, submit as-built drawings within 30 days of completing repairs, including a certification of structural integrity stamped by a certified engineer.
- j. By May 1, 2020, achieve permanent stabilization of the Site, such that all nonvegetative stabilization measures are installed in accordance with the approved plan and a permanent vegetative cover is achieved that is uniform, mature enough to survive, and will inhibit erosion.

2. Complete stream restoration as follows:

- a. Within 30 days of the date of this Order, submit a plan for stream restoration¹ of the unnamed tributaries of the Poplar Camp Creek arm of Smith Mountain Lake affected by sediment discharges from the breached dam. The plan shall be prepared by a professional with demonstrated experience conducting stream restorations. The plan shall include proposed methods of sediment removal, the location for placing materials in a manner they will not wash back into the stream, and permission of the property owner to access the property to perform the restoration.
- b. Respond to any DEQ comments on the plan within 14 days from the date of receiving such comments.

¹ Stream restoration means the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

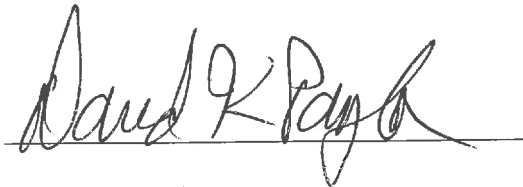
- c. Within 30 days of the restoration plan approval by DEQ, complete the restoration of the stream that was impacted by the discharge of sediment caused by the breached dam. Stream restoration shall be conducted in accordance with the approved plan and shall include, but not be limited to, removal by hand of any remaining sediment accumulated in the stream. No heavy equipment shall be used in the restoration of the streams.
 - d. Notify DEQ in writing 7 days prior to initiating sediment removal from the streams.
- 3. Remove sediment impacts from Smith Mountain Lake as follows:
 - a. Within 30 days from the date of this Order, enter into and submit to DEQ a contract with an environmental consultant to develop and oversee implementation of a Corrective Action Plan ("CAP") to remove the sediment impacts from Smith Mountain Lake. The environmental consultant must have demonstrated experience preparing wetland delineations, Virginia Joint Permit Applications permit applications, and be capable of preparing a dredging plan and a dredged material disposal plan.
 - b. Within 90 days from the date of this Order, submit to DEQ a CAP to remove the sediment impacts from Smith Mountain Lake. The CAP must be developed by the environmental consultant described in paragraph 3(a) above. The CAP must include a complete draft application for each review agency, from which a permit or approval is necessary to complete the CAP, including a wetland delineation, complete dredging plan, a complete dredged material disposal plan, a complete erosion and sediment control plan for the material disposal area, and implementation schedule. The CAP must provide for completion of all sediment removal within 11 months from the date of this Order.
 - c. Respond to any DEQ comments on the CAP within 14 days from the date of receiving such comments
 - d. Within 120 days from the date of this Order, submit all applications for permits and approvals necessary to complete the CAP. Entities from which permits or approvals may be necessary include, but are not limited to, DEQ, Franklin County, American Electric Power, and the United States Army Corps of Engineers.
 - e. Respond to any comments from application review agencies within 14 days from the date of receiving such comments.
 - f. Within 120 days from the effective date of this Order enter into and submit to DEQ property access agreements with any third parties owning property that must be accessed to complete the CAP.

- g. Upon issuance of all permits required to implement the sediment removal project, implement the CAP in accordance with the schedule contained therein and as authorized by permitting agencies. The environmental consultant described in paragraph 3(a) above must oversee implementation of the CAP.
 - h. Notify DEQ in writing 7 days prior to initiating sediment removal from the lake. Complete all actions required by the CAP within 11 months from the date of this Order.
 - i. Notify DEQ within 7 days of completion of all actions required by the CAP.
4. Within 30 days of the effective date of this Order, pay a civil penalty of **Ten Thousand Dollars (\$10,000)**. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

The duration of this Order shall be twelve months from the date that it is entered.

Enter this order this 28 day of October, 2019

A handwritten signature in black ink, appearing to read "David K. Paylor", is written over a horizontal line.

David K. Paylor
Director, Department of Environmental Quality

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IN RE: Roger Darron Hutcherson

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Preliminary Statement

This case concerns whether Roger Darron Hutcherson violated certain provisions of the State Water Control Law, Va. Code §§ 62.1-44.2 et seq. and the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210-10 et seq. (the “Regulations”), at the Hutcherson Pond, located at 4066 Webster Road in Glade Hill, Virginia (the “Site”). Also at issue is whether injunctive relief and a civil penalty are warranted for the alleged violations.

On August 26, 2019, DEQ staff held a Special Order Proceeding (the “Proceeding”) in this matter pursuant to Va. Code §§ 2.2-4019 and 10.1-1186 before presiding officer Amy Owens. The Proceeding took place in Salem, Virginia, at the Department of Environmental Quality (“DEQ”) Blue Ridge Regional Office (“BRRO”). Mr. Hutcherson did not appear at the Proceeding and was not represented by counsel.

Attached are a recording of the Proceeding and the exhibits numbered as they were received. The exhibits include a copy of the July 26, 2019 Notice of Special Order Proceeding, delivery tracking, and an August 1, 2019 memorandum documenting hand delivery of the Notice of Special Order Proceedings to Mr. Hutcherson’s residence. DEQ Exh. 12. The Exhibits also include the DEQ Exhibit Book, containing DEQ Exhibits 1-11, and additional exhibits introduced by DEQ during the Proceeding, labeled as DEQ Exhibits 12-15. DEQ called two witnesses during the Proceeding: Jay Roberts, BRRO Stormwater and Virginia Water Protection Programs Manager; and Nelson Dail, BRRO Deputy Regional Director.

II. Findings of Fact

Jurisdiction and Venue

1. Mr. Hutcherson owns the Site located at 4066 Webster Road in Glade Hill, Virginia. DEQ Exh. 1; Testimony of Jay Roberts.
2. The Site is located within the part of the Commonwealth administered by DEQ’s BRRO. Testimony of Jay Roberts.

Notice

3. On July 26, 2019, DEQ sent Mr. Hutcherson a Notice of Special Order Proceeding, along with the DEQ Exhibit Book, notifying him of the Proceeding. DEQ Exh. 12. United States Postal Service tracking indicates that the notice was delivered on July 29, 2019. DEQ Exh. 12.

4. Jay Roberts also hand delivered the Notice of Special Order Proceeding and DEQ Exhibit Book to Mr. Hutcherson's house on August 1, 2019. DEQ Exh. 12.
5. Va. Code § 2.2-4019 states that parties to informal fact finding proceedings have the right to "have reasonable notice thereof."

Site Observations

6. During a May 24, 2017 inspection of the Site and adjacent property, DEQ staff observed stream impacts to 1,650 linear feet of unnamed tributaries of the Poplar Camp Creek arm of Smith Mountain Lake, including impacts to 150 linear feet of stream on the Site and 1,500 linear feet of stream on the adjacent property owned by the Frances S. Poindexter Children's Trust, Charles D. Poindexter, Trustee (Parcel ID 0460010100). Testimony of Jay Roberts; DEQ Exh. 2 and 14. On May 24, 2017, DEQ staff also observed impacts to between 0.05 and 0.1 acres of wetlands and impacts to Smith Mountain Lake. These impacts were located downstream from the Site. Testimony of Jay Roberts; DEQ Exh. 2.
7. DEQ has not issued a VWP Permit for these impacts. Testimony of Jay Roberts.
8. The impacts to streams, wetlands, and Smith Mountain Lake observed on May 24, 2017 were caused by a partial breach of the dam on the Hutcherson Pond,¹ involving a headcut in the impoundment structure. Testimony of Jay Roberts; DEQ Exh. 2. According to Mr. Hutcherson, the breach occurred when he was replacing the pond's drainage structure and heavy rains occurred. Testimony of Jay Roberts; DEQ Exh. 2.
9. Aerial imagery of the Site from Google Earth dated May 15, 2017 shows the headcut in the impoundment structure and new sediment deposits in Smith Mountain Lake, compared to previous images dated April 16, 2014 and September 17, 2015. Testimony of Jay Roberts; DEQ Exh. 15.
10. On June 14, 2017, DEQ issued a Warning Letter to Mr. Hutcherson for unpermitted impacts to state waters, on the basis of the May 24, 2017 inspection. Testimony of Jay Roberts; DEQ Exh. 3.
11. During an inspection of the Site on October 12, 2017, DEQ staff observed that some sedimentation had been removed from one of the impacted streams, but other impacts remained in place. Testimony of Jay Roberts; DEQ Exh. 4. At the time of the October 12, 2017 inspection, Mr. Hutcherson had not completed repairs to the dam, and the Site was not stabilized. Testimony of Jay Roberts; DEQ Exh. 4.
12. By letter dated October 20, 2017, DEQ notified Mr. Hutcherson of the observations from the October 12, 2017 inspection and concerns regarding Site conditions. Testimony of Jay Roberts; DEQ Exh. 5.

¹ The Hutcherson Pond is used primarily to water cattle and has a surface area of 1.5 to 2.0 acres. Testimony of Jay Roberts; DEQ Exh. 2.

13. An assessment of a cove within Smith Mountain Lake by DEQ staff on January 24, 2018 indicated approximately 475 cubic yards of sediment was discharged to the cove as a result of the breach of the Dam on the Hutcherson Pond. Testimony of Jay Roberts; DEQ Exh. 6.
14. DEQ staff observed additional impacts to 1,500 linear feet of stream (in the same area previously impacted) and to Smith Mountain Lake on November 14, 2018, November 19, 2018, January 3, 2019, and June 28, 2019 due to incomplete repairs, unstabilized Site conditions, and additional dam breaches. Testimony of Jay Roberts; DEQ Exh. 7, 8, and 10.
15. DEQ issued a Notice of Violation to Mr. Hutcherson on January 11, 2019 for the unpermitted impacts to state water observed on November 14, 2018, November 19, 2018, and January 3, 2019. Testimony of Jay Roberts; DEQ Exh. 9.
16. During a meeting with DEQ staff on February 25, 2019, Mr. Hutcherson agreed to complete dam repair or removal, provide DEQ with an engineer certification of dam repair or removal, complete sediment removal from the stream, and provide DEQ with a plan of action for addressing sediment in Smith Mountain Lake by the end of May 2019. Testimony of Nelson Dail. However, at the time of DEQ's June 28, 2019 inspection, Mr. Hutcherson had not completed any of these actions. Testimony of Nelson Dail; DEQ Exh. 10.
17. As of DEQ's inspection of the Site on June 28, 2019, dam repairs at the Site remained incomplete, allowing continued discharges of sediment to streams and Smith Mountain Lake. Testimony of Jay Roberts; DEQ Exh. 10.
18. DEQ staff repeatedly advised Mr. Hutcherson to retain an engineer to ensure the future integrity of the impoundment structure. Testimony of Jay Roberts; DEQ Exh. 2 and 3. The repair and maintenance of the dam should be designed by an engineer "because of the scope of the engineering analysis that should be performed, and the complexity of the work necessary to repair the damaged drain pipe and impoundment structure, including proper compaction of the structural fill." Testimony of Jay Roberts; DEQ Exh. 2 and 3.

Applicable Legal Requirements

19. Va. Code § 62.1-44.15:20(A) states, "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: . . . Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."
20. 9 VAC 25-210-50(A) states, "Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters; . . . otherwise alter the physical, chemical, or biological properties of state waters regulated under this chapter and make them

detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses”

Calculation of Civil Penalty

21. Nelson Dail explained how the penalty was calculated for Mr. Hutcherson, using the VWPP Civil Charge/Civil Penalty Worksheet (the “Worksheet”) included in DEQ’s Civil Enforcement Manual. Testimony of Nelson Dail; DEQ Exh. 11. This worksheet is used throughout the Commonwealth to calculate civil charges and civil penalties for VWP violations. Testimony of Nelson Dail; DEQ Exh. 11.
22. A total civil penalty of \$48,750 was calculated for Mr. Hutcherson on the Worksheet. Testimony of Nelson Dail; DEQ Exh. 11.
23. Two occurrences were assessed on line 1(a)(i) of the Worksheet for unauthorized impacts to wetlands and/or stream. Testimony of Nelson Dail; DEQ Exh. 11. One occurrence was assessed as serious to address the 1,650 linear feet of stream impacts. Additionally, one occurrence was assessed as marginal to address the impacts to 0.05-0.1 acres of wetlands. Testimony of Nelson Dail; DEQ Exh. 11. The potential for harm was assigned based on the extent of the stream and wetland impacts, in accordance with the guidance in DEQ’s Civil Enforcement Manual. Testimony of Nelson Dail; DEQ Exh. 11.
24. The degree of culpability was ranked as serious because Mr. Hutcherson failed to take reasonable precautions to address ongoing violations and failure to provide a timely remedy to the impacts. Testimony of Nelson Dail; DEQ Exh. 11.
25. Penalties for Mr. Hutcherson’s violations have not been assessed previously in any order or case decision. Testimony of Nelson Dail.
26. Penalties in orders issued under Va. Code § 10.1-1186 are limited to \$10,000. Va. Code §§ 10.1-1182, 10.1-1186.
27. A civil penalty of \$10,000 is appropriate to address Mr. Hutcherson’s violations in this case.

III. Conclusions of Law

1. Mr. Hutcherson is a “person” under Va. Code § 62.1-44.3.
2. DEQ’s BRRO is an appropriate venue for the Proceeding.
3. Mr. Hutcherson had reasonable notice of the Proceeding in accordance with Va. Code § 2.2-4019.
4. Mr. Hutcherson caused impacts to state waters in violation of Va. Code § 62.1-44.15:20(A) and 9 VAC 25-210-50(A).

IV. Recommended Relief

I recommend that the Director issue a Special Order pursuant to Va. Code § 10.1-1186 to compel Mr. Hutcherson to comply with the State Water Control Law and the Regulations. Specifically, I recommend that the Special Order require that Mr. Hutcherson:

1. Repair or remove the dam on Hutcherson Pond as follows:
 - a. Within 14 days from the date of the Special Order, notify DEQ in writing if the dam will be repaired or removed.
 - b. Within 14 days from the date of the Special Order, install interim erosion and sediment controls, meeting the minimum standards set forth in 9 VAC 25-840-40, and submit photos of measures implemented to prevent additional impacts to state waters while other actions listed herein are implemented.
 - c. Within 30 days from the date of the Special Order, ensure that a vegetative cover is achieved on all areas of bare soil that is uniform, mature enough to survive, and will inhibit erosion until permanent corrective actions are completed. In the event DEQ observes the vegetative cover does not meet the listed cover criteria, reinstall measures within 7 days of receiving notice from DEQ that effective cover was not achieved.
 - d. Within 30 days of the date of the Special Order, retain services of a licensed professional engineer to prepare a plan for repairing or removing the dam.
 - e. Within 90 days of the date of the Special Order, submit a complete plan and schedule to DEQ and Franklin County for repairing or removing the dam stamped by a professional engineer. The plan shall include a construction sequence, any structural measures to be installed to repair the dam, and erosion and sediment controls to be implemented during construction. The plan shall provide for completion of dam removal or repair by April 1, 2020.
 - f. Respond to any DEQ comments on the plan within 14 days from the date of receiving such comments.
 - g. Within 60 days of plan approval, either dismantle or repair the dam in accordance with the approved plan and schedule in a manner that does not cause additional impacts to state waters. All repair and removal work shall be conducted by a contractor licensed by the Department of Professional and Occupational Regulation and experienced performing dam repairs.
 - h. Notify DEQ in writing 7 days prior to initiating construction related to the dam.
 - i. If the dam is repaired, submit as-built drawings within 30 days of completing repairs, including a certification of structural integrity stamped by a certified engineer.

- j. By May 1, 2020, achieve permanent stabilization of the Site, such that all nonvegetative stabilization measures are installed in accordance with the approved plan and a permanent vegetative cover is achieved that is uniform, mature enough to survive, and will inhibit erosion.

2. Complete stream restoration as follows:

- a. Within 30 days of the date of the Special Order, submit a plan for stream restoration² of the unnamed tributaries of the Poplar Camp Creek arm of Smith Mountain Lake affected by sediment discharges from the breached dam. The plan shall be prepared by a professional with demonstrated experience conducting stream restorations. The plan shall include proposed methods of sediment removal, the location for placing materials in a manner they will not wash back into the stream, and permission of the property owner to access the property to perform the restoration.
- b. Respond to any DEQ comments on the plan within 14 days from the date of receiving such comments.
- c. Within 30 days of the restoration plan approval by DEQ, complete the restoration of the stream that was impacted by the discharge of sediment caused by the breached dam. Stream restoration shall be conducted in accordance with the approved plan and shall include, but not be limited to, removal by hand of any remaining sediment accumulated in the stream. No heavy equipment shall be used in the restoration of the streams.
- d. Notify DEQ in writing 7 days prior to initiating sediment removal from the streams.

3. Remove sediment impacts from Smith Mountain Lake as follows:

- a. Within 30 days from the date of the Special Order, enter into and submit to DEQ a contract with an environmental consultant to develop and oversee implementation of a Corrective Action Plan ("CAP") to remove the sediment impacts from Smith Mountain Lake. The environmental consultant must have demonstrated experience preparing wetland delineations, Virginia Joint Permit Applications permit applications, and be capable of preparing a dredging plan and a dredged material disposal plan.
- b. Within 90 days from the date of the Special Order, submit to DEQ a CAP to remove the sediment impacts from Smith Mountain Lake. The CAP must be developed by the environmental consultant described in paragraph 3 (a) above. The CAP must include a complete draft application for each review agency, from which a permit or approval is necessary to complete the CAP, including a wetland

² Stream restoration means the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

delineation, complete dredging plan, a complete dredged material disposal plan, a complete erosion and sediment control plan for the material disposal area, and implementation schedule. The CAP must provide for completion of all sediment removal within 11 months from the date of the Special Order.

- c. Respond to any DEQ comments on the CAP within 14 days from the date of receiving such comments
 - d. Within 120 days from the date of the Special Order, submit all applications for permits and approvals necessary to complete the CAP. Entities from which permits or approvals may be necessary include, but are not limited to, DEQ, Franklin County, American Electric Power, and the United States Army Corps of Engineers.
 - e. Respond to any comments from application review agencies within 14 days from the date of receiving such comments.
 - f. Within 120 days from the effective date of the Special Order enter into and submit to DEQ property access agreements with any third parties owning property that must be accessed to complete the CAP.
 - g. Upon issuance of all permits required to implement the sediment removal project, implement the CAP in accordance with the schedule contained therein and as authorized by permitting agencies. The environmental consultant described in paragraph 3(a) above must oversee implementation of the CAP.
 - h. Notify DEQ in writing 7 days prior to initiating sediment removal from the lake. Complete all actions required by the CAP within 11 months from the date of the Special Order.
 - i. Notify DEQ within 7 days of completion of all actions required by the CAP.
4. Within 30 days from the date of the Special Order, pay a civil penalty of \$ 10,000.

Respectfully submitted,



Amy Owens
Regional Director
DEQ Valley Regional Office